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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1375

JOHN K. McMURRAY,
by his conservator, Mrs. John K. McMurray,

Petitioner,

v.

HENRY WENDELKEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered in flagrant denial of substantive due process of law to him, which deprived him of a judgment received for critical bodily injuries.

OPINIONS BELOW

The United States District Court for the Southern District of Mississippi, Southern Division, rendered its opinion and judgment in favor of petitioner on February 28, 1967, which is not officially reported. They are set forth, however, on pages 237 to 255 of the record.

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on December 14, 1967, is reported at 388 F.2d 553 (pp. 20-25, *infra*).

Petitioner's motion for a rehearing on a hearing en banc was denied on January 30, 1968. 388 F.2d 556. A certified copy of the order denying same is filed with this petition (R. 702, p. 25 *infra*).

JURISDICTION

Jurisdiction in the courts below was based on diversity of citizenship and the jurisdictional amount, after being removed from the Circuit Court of Jackson County, Mississippi, 28 U.S.C. 1441. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

This case presents two questions. First, whether the United States Court of Appeals for the Fifth Circuit denied the petitioner substantive due process of law, as guaranteed by the Fifth Amendment to the Constitution of the United States, by applying foreign law rather than the law of Mississippi when it held that the respondent as a motorist was under no duty to slow or stop to avoid injuring a pedestrian. Second, whether the failure of that court to apply, or to construe and apply, the substantive law of Mississippi sets a dangerous precedent for the administration of federal courts in diversity of citizenship cases.

STATUTES INVOLVED

The pertinent statutes, Mississippi Code of 1942, Recompiled, Sections 8176 and 8202, are hereinafter discussed in the argument and are set out fully in the Appendix.

STATEMENT OF FACTS

This petition protests the reversal of a judgment obtained by a motorist critically injured in a two-car automobile collision on U.S. Highway 90, west of Pascagoula, Mississippi. At the point of collision the road contained two driving strips of blacktop asphalt, bordered by an eight-foot wide stabilized shoulder on the south, and divided by a forty-foot grass median strip. The highway ran in an east-west direction and passed through open rural country with no structure within several miles of the collision.

Respondent was driving his car at 60 miles per hour in an easterly direction in the right-hand lane when he first saw a pedestrian some 600 feet ahead, standing on the right-hand shoulder just two feet off the asphalt portion of the road. Respondent further testified that the pedestrial was looking to the north, not to the east or west. He also admitted that he considered the situation unusual. (R. 641) He nevertheless did not deviate from his speed of 60 miles an hour, or even sound his horn.

The pedestrian continued to look straight ahead until the respondent was some 200 to 250 feet away from him before taking any precautionary action. Then when the pedestrian stepped into the roadway the respondent finally applied his brakes but, as the District Court found, it was too late to stop.

Respondent veered his car to the left and, when approximately even with the pedestrian—who was then north of the center of the strip—left the road. It crossed the median and eventually entered the west-bound roadway where it struck petitioner's car in the northernmost lane.

The trial judge found that the respondent's negligence in failing to slow down when he first noticed the pedestrian, or later to stop, caused him to lose control of his car and to subsequently collide with and injure the petitioner.

In a split decision this finding was reversed.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Fifth Circuit erred to the extent of denying petitioner substantive due process of law when it held that the respondent was under no duty of reasonable care to the pedestrian and that he could avail himself of the doctrine of sudden emergency, both holdings being directly contrary to plainly applicable Mississippi law. And the Court further erred to the extent of creating a precedent dangerous to the operation of federal courts in diversity cases by failing to apply or even attempting to apply the law of the forum of Mississippi.

REASONS FOR GRANTING THE WRIT

The petitioner urges that writ of certiorari should issue in this case because of this Court's own Rule 19(b) which indicates that one of the prime instances for such a grant is when a federal court has decided an important state question in a way which conflicts with applicable state law.

While automobile accidents are in and of themselves rather commonplace, such does not reduce the gravity of their results to their victims. If then a state should seek to impose on drivers within that state duties and responsibilities more stringent than those in other states, that action, whether by stutute or case law, is within the realm of protecting the health and welfare of its citizens. The degree of protection afforded, or conversely the degree of responsibility imposed is then purely a matter of local concern. And because the concern relates to a commonplace event does not detract from its being of substantial concern to the citizens of that state.

The Mississippi legislature and her courts have provided laws for the protection of pedestrians and motorists on its highways, but the United States Court of Appeals for the Fifth Circuit has disregarded them in reversing a judgment obtained by the petitioner against a motorist for negligent driving. Indeed, it went beyond the borders of the State to find some law which more closely coincided with its opinion of what Mississippi law should be.

Moreover, the method of reaching its decision is in direct conflict with the decisions of this Court as to the applicability of State law in a federal court, and so far departs from the ordinary process of a federal court in rendering a decision that this Court should exercise its discretionary powers of supervision to inveigh against further divergences by federal courts which may be inclined to render their own decisions in situations where no such discretion exists.

ARGUMENT

I

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENIED THE PETITIONER SUBSTANTIVE DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION, BY APPLYING FOREIGN LAW RATHER THAN THE LAW OF MISSISSIPPI IN A DIVERSITY OF CITIZENSHIP CASE.

a. The Majority Opinion of the Court of Appeals Reveals that Court's Scant Attention to the Law of Mississippi When It Ruled that the Respondent Motorist Was Under No Duty To Slow Down or Stop To Avoid Injuring a Pedestrian.

After the District Court had rendered its opinion and judgment in favor of the petitioner (R. 237), the respondent raised six questions on appeal. Of these, the Court of Appeals expressly dealt with only two, namely that:

1. The Court erred in finding for the petitioner; and
2. The Trial Court erred in failing to take into consideration the doctrine of sudden emergency in rendering its opinion and judgment in the case. (R. 237, pp. 20-25, *infra.*)

Reversing the factual finding of the Trial Court on the first of the above questions, the Court of Appeals ruled that the respondent was under no duty to the pedestrian to slow or to stop. (R. 660)

The petitioner had relied in part on Section 8202(d) of the Mississippi Code (p. 19, *infra*) which requires that:

> Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

The Mississippi Legislature obviously thought it advisable to word the statute broadly, but the Court of Appeals herein not only attempts to limit the scope of the statute to drunken pedestrians (which the pedestrian herein admittedly was), which clearly was not the intent of the statute, but concludes on its own, contrary to the undisputed evidence, that the pedestrian prior to his moving onto the asphalt portion of the roadway communicated no appearance that he was intoxicated.

The statute imposes a duty of care in any situation where a motorist observes, or should have observed, any sign or appearance of abnormality in a pedestrian. In this case we do not have to rely on that portion of the statute which alludes to "should have observed", the respondent admitted that he regarded it "unusual for a pedestrial to be there." (R. 641)

Another section of the Code, Section 8176(b), in pertinent part, commands:

> The driver . . . must decrease speed . . . when special hazard exists with respect to *pedestrians* or other *traffic*, or by reason of *weather or highway conditions*, and speed shall be decreased . . . to avoid colliding with any person . . . on or entering the highway with legal requirements. (Emphasis supplied)

While this provision of the statute cites three situations of special hazard, the Court of Appeals limited its consideration to only one of them, weather and highway conditions, and said that respondent was not required to slacken his speed before the pedestrian stepped onto the pavement because the weather and traction were good. It completely ignored the only question in point, namely, what was the duty of the respondent motorist after he observed the pedestrian in an admittedly "unusual" situation.

Then, as though a case decision were necessary to validate the above statutory requirement, the said Court inserted the following amazing footnote (in pertinent part):

> Counsel have pointed us to no Mississippi case on this point. . . .

Amazing, petitioner feels, because he had cited the case of *Avery v. Collins*, 71 Miss. 636, 157 So. 695 (1935), which involved a motorist who was held liable for injuries to a pedestrian who was walking on the right side of a graveled roadway, and was struck from behind when he jumped into the path of the automobile he was not aware of and whose speed was not diminished until it was twenty feet away.

The Court of Appeals for the Fifth Circuit herein not only erroneously limited the application of the above principle to what was apparent after the drunken pedestrian began his movement across the pavement, but inferred that the respondent could rely on the pedestrian to remain where he was. Such inaction by the pedestrian would have been compliance on his part with traffic laws, but Mississippi courts have plainly said that a motorist may not rely on a pedestrian to obey traffic laws. *Avery v. Collins, supra.*[1]

[1] Also, McMinn v. Lilly, 215 Miss. 293, 60 So. 2d 603 (1952), and Stevenson v. Robinson, 37 So. 2d 568 (Miss. 1948).

Other Mississippi case decisions were cited to the said Court too, as will be shown in the next sub-section dealing at greater length with the subject of the respondent's duty to the pedestrian and other motorists, but it chose to be bound by a looser concept of what a motorist may assume with respect to a pedestrian, drawn from two Kentucky and one Louisiana state court decisions cited in footnote. The manner in which it failed to apply the law of Mississippi, the State in which the collision occurred, regarding sudden emergency is dealt with in sub-section "c" herein.

b. Mississippi Law Imposes a Greater Duty on Motorists than the Degree of Care Assessed by the Court Below Based on the Requirements of Other States.

The Court below deprived the petitioner of substantive due process of law when, instead of applying Mississippi law, it invoked the less stringent laws of other states regarding the respondent's duty, citing *Whittaker v. Thornberry*, 306 Ky. 830, 209 S.W.2d 498 (1948); *Trainor's Adm'r. v. Keller*, 257 Ky. 840, 79 S.W.2d 232 (1935); *Silvera v. Gallardo*, 63 So. 2d 15 (La. App. 1953).

The *Whittaker* case involved a pedestrian who stepped off a curb and was struck by or walked into a bus. The Kentucky Supreme Court upheld the following instruction in behalf of the defendant:

> It has long been the law that a motorist need not anticipate that an adult person seen in a place of safety will leave that place and come into a path of danger until that person makes some movement that reasonably indicates that he will do so.

The Kentucky court talked of a "place of safety" in regard to a city intersection, not the lonely stretch of high-speed road in this case; it is also talked of "some movement", not the communication by appearance deemed sufficient to give notice by the Court of Appeals itself.

The *Trainor* case also involved a pedestrian who stepped off a curb or from between parked cars and said:

> While a driver of an automobile is not required to anticipate that a pedestrian seen in a place of safety will leave it and get in the danger zone until some demonstration or movement on his part reasonably indicates that fact, yet cases do arise where it becomes the driver's duty to give warning to one on the highway or in close proximity to it who is apparently oblivious to the approach of the car, or one whom the driver, in the exercise of ordinary care, may reasonably anticipate will come into his way.

Here again the place of safety referred to was a city curb, and the notice required was actual movement.

While the pedestrians in the above two cases were on the same side of the street as was the vehicle, the pedestrian in *Silvera* was initially on the opposite side of the road from the defendant's car. In that case the facts are unclear, but the pedestrian was either standing on the opposite edge for a very brief period of time or immediately came up the embankment of the road and ran across it into the path of the defendant. The court of appeals said:

> As every motorist knows, many pedestrians stand along the roadsides. The operators of vehicles are fully justified in believing that such pedestrians will remain in places of safety and not dart out into the highway in the paths of moving automobiles. Common sense indicates such a rule.

To paraphrase the court by inserting the requirements of Mississippi law would make the sentence read: Common sense indicates that all pedestrians will obey traffic laws. Mississippi has already said that that position is erroneous.

Notwithstanding the requirements of Mississippi cases and statutes, the Court of Appeals reversed the finding of the district court and ruled that in a factual situation such as the one in this case there was no duty on the part of the respondent to slow or stop.

Yet it was clearly shown that Mississippi civil liability law required even more. The exercise of reasonable care by a

motorist to avoid injuring a pedestrian is a generic category into which such actions fall. But the Court below declared that there was no duty to the pedestrian "to slow or stop" as a matter of law. Does Mississippi law then include a duty of slowing or stopping within that generic term? It most certainly does. And the duty to warn too! There are three steps which may have to be taken in the exercise of reasonable care, and two come into play when the one prior to it fails to produce the required safe result.

The first of these is the duty to warn the pedestrian of the motorist's approach. As was held in the cited *Avery v. Collins, supra,* that Mississippi Court insisted that:

> As soon as he (the motorist observed the pedestrian walking on that side with his back to the automobile, it was the duty of the driver to sound his horn until he observed that the pedestrian had become aware of the approach of the automobile. . . . (R. 00)

When blowing the horn or any other means of warning is not sufficient to make the pedestrian aware either of the approach of the car or that he is in danger, then it is necessary for the driver to go a step beyond merely warning. He must slow down. Finally, if slowing is not sufficient, he must stop.

> When it was observed that the pedestrian was unaware, it was the duty of the driver to apply his brakes and to slow down, and to come to a stop, if necessary, before the pedestrian was reached.[2]

As was stated above, these duties are augmented in Mississippi by the rule that a motorist may not assume that a pedestrian will obey all traffic laws. Although the pedestrian herein was not clearly disobeying any traffic law, he did by the respondent's own admission present an "unusual" situation. As was said in *McMinn* and *Stevenson, supra,* therefore,

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[2] *Avery v. Collins, supra;* see also Layton v. Cook, 248 Miss. 690, 160 So. 2d 685 (1964).

> The motorist may therefore have to be on the alert for the possibility that a pedestrian in an unusual situation will do something even more unusual, especially when the pedestrian is not paying attention to the movement of traffic. (R. 279)

c. To Derive any Benefit from the Sudden Emergency Doctrine, One May Not in any Way Cause or Contribute to the Situation.

If, as the Court below concluded, the respondent had no duty to the pedestrian, then its comments on the sudden emergency doctrine were extraneous. But if, as the petitioner contends, a duty did exist, then the following is asserted to show that the respondent could not be exonerated of his duty in such a factual situation as this because he had, at least, contributed to the emergency.

Mississippi law is quite clear that only where a party has not created or even contributed to a situation may he claim the benefit of the sudden emergency rule. *Jones v. Dixie Greyhound Lines, Inc.*, 211 Miss. 34, 50 So. 2d 902 (1951). The trial judge found, and there was evidence to support his finding, that the respondent had been negligent after he had observed the pedestrian in that admittedly "unusual" situation. This negligence then obviated the application of the emergency rule.

The respondent's negligence occurred before the pedestrian stepped onto the asphalt part of the roadway; thus the respondent placed himself in the position of peril which later arose. It may have been unawareness of the conditions around him that placed him in peril, but he cannot ignore the conditions around him while he is driving and still claim that any situation is an emergency. There are some emergencies which must be anticipated. *Peel v. Gulf Transport*, 252 Miss. 797, 174 So. 2d 377 (1965).

Reasonable care in the operation of an automobile requires it. But the respondent, who by his own admission was on

notice that the situation was unusual, ignored the conditions and did not anticipate the emergency.

Since the respondent was negligent prior to the time that the pedestrian stepped out, the comment by the Court of Appeals that he was later presented with an emergency arising out of the same conditions do not alter respondent's responsibility for the results of that negligence, namely the consequential injuries to the petitioner.

As part of its superflous consideration of the emergency issue, the Court below stated that the district court made no finding that after the emergency arose the respondent acted with less than reasonable care, adding that it too finds no after-emergency want of care. Although it did not expressly base its reversal on this latter finding, the fallacy in the allusion to the subject is patent. The trial judge based his judgment on the respondent's negligence in failing to warn or slow down before the pedestrian moved out into his path. (R. 249) Having done so there was no need for him to find any want of respondent care thereafter.

In Brief Summary to this Point: The only law relative to a motorists' duties in this case is the law of Mississippi. *Erie R. Co. v. Thompkins*, 304 U.S. 64. When the Court herein, cast such a superficial and incomplete glance at the case law of Mississippi on this subject, its ruling did not give any effect to the whole body of law of the State. Rather it expressly applied the law of Kentucky and Louisiana.

> We conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred. *Richards v. United States*, 369 U.S. 1.

II

THE FAILURE OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT TO APPLY, OR TO CONSTRUE AND APPLY THE SUBSTANTIVE LAW OF MISSISSIPPI SETS A DANGEROUS PRECEDENT FOR THE ADMINISTRATION OF FEDERAL COURTS IN DIVERSITY OF JURISDICTION CASES.

There are three possible background situations with regard to the State law in any diversity case coming before a federal court: the topic in question may have been previously determined by the appropriate State court, the said court may have never considered the question, or most likely the said court may have considered the question generally but had not yet applied the law to the specific situation now at hand. Your petitioner can show that under any one of these three situations he is entitled, as a matter of Mississippi law, to the judgment he obtained, and that the reversal by the Court below denied him substantive due process.

If the State law is well settled, then the federal courts, if there is no infringing question of federal law or policy, as here, must apply that State law just as the inferior State courts in that State would have to do. In this clearly defined situation the federal courts have no discretion. *Klaxton v. Stentor*, 313 U.S. 487.

Petitioner contends that herein there is just such a clear situation, there being substantial statutory and case law in Mississippi on the subjects of duty and sudden emergency. In this case the fact-finding and law-applying functions were combined in the judge's sitting without a jury. The Court below therefore need not be able to say that it would have reached the same conclusion to affirm. The joining of the facts and the law need meet only one real criterion: Was it permissible?

If the State courts have not made any decision on a given topic, the federal courts may not avoid the question or reverse out of hand. *Meredith v. City of Winter Haven*, 320 U.S. 228. And the action must be in the form of a con-

struction and application of what relevant law does exist in the State. *Huddleston v. Dwyer*, 322 U.S. 232.

Your petitioner contends most strongly that there is no dearth of statute and case law relevant here. But he offers this second possibility merely to show that even if, somehow unaccountably, the Court below honestly felt that there was no law in Mississippi requiring the respondent to slow down or stop, it could not reverse on that basis as it did here. A reversal could properly issue only if it found that no reasonable construction of the pertinent statute, or other similar case decisions in that State, was permissible in the petitioner's favor. *McAllister v. United States*, 348 U.S. 19.

When then the Court below made its decision without even the barest indicia of compliance with the mandate of this Court, petitioner has been denied the effect of Mississippi law. Petitioner must concede that if Mississippi law were strongly adverse to him and to the safety of other motorists, such a reversal might not be violative of due process. However, petitioner respectfully submits that the trial judge herein found applicable law (R. 246, 249), and the Court below made no determination of whether the law which that judge found could permissibly be applied to the facts.

Moreover, the Court below not only said there was no Mississippi law on the point, but went beyond that State to try to bolster its error. The parties were entitled to judgment under Mississippi law, but the conclusion petitioner feels is inescapable is that this case involving Florida and Louisiana residents who collided in Mississippi was decided on appeal under Kentucky law.

The third possible background situation is one where the law of the State is uncertain. Here again however, the Court below may not decline to exercise its duty to render a decision which provides the same result as in the State court. Here again the Court of Appeals must construe and apply what State law there is. *Six Companies v. Joint Highway District*, 311 U.S. 180.

If, however, the Court of Appeals finds itself confused or uncertain of what its construction and application should be, it has a perfectly legally acceptable ally to which it might turn. Another long series of cases indicates that both this Court and the Circuit Courts of Appeals will give much weight to the findings regarding local law made by the trial judge. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198.

He is presumptively the most familiar with the day-to-day operation and intricacies of local law. Indeed, not only do the cases say that the Court of Appeals should defer, but that they should not overturn him where his conclusion is reasonable and permissible—not necessarily correct—under the existing state law. *Luther v. Maple*, 250 F.2d 916 (8th Cir.).

Lest federal courts proceed as they please, with the tacit hope that state courts will subsequently exercise their "corrective" powers, the decisions of this Court make it plain that the inferior federal courts are bound by all the rules of operation previously discussed. *Palmer v. Hoffman*, 318 U.S. 109.

Petitioner therefore has not received even this less demanding duty of the Court of Appeals. No construction or application of local law was made and, of course, the finding of the trial judge was not adopted. Consequently the petitioner has been denied any semblance of his substantive rights and stands divested of his recovery for disabling injuries negligently occasioned by the respondent.

Re National Importance: Moreover, the petitioner's injury does not inure to him alone. If this anomalous reversal is allowed to stand, unnumbered citizens who avail themselves of the Congressionally provided access to federal courts will find that they can no longer be assured of rights that have been available for the past thirty years, since this Court decreed that there is no federal common law for diversity actions. *Erie R. Co. v. Thompkins, supra.* The Fifth Circuit needs particularly to be reminded for this is a prime example of the temptation that occasionally leads a federal court in

a diversity case to attempt to create its own law. It is just when a court, such as the Court of Appeals here, renders a decision with nothing supporting it from below or suspending it from above, that not only the party but the public will suffer from the uncertainty.

The court's action if allowed to stand will give tacit permission to a third system of courts, nowhere contemplated. State courts will remain bound to state law and the United States Constitution. Some federal courts will be bound to state law in diversity actions; but only those who wish to be bound. The remaining federal courts will apply whatever law they please, in whatever diversity situations they please, with no recognized boundaries except their own predispositions.

The facts are clear; the law is definite; and this Court has many times stated the law. Petitioner stands injured, and the only obstacle between him and his just recovery is the totally inexplicable and presumably capricious action of the Court of Appeals.

CONCLUSION

Wherefore, petitioner prays that a writ of Certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the Fifth Circuit, and upon review the judgment of said Court of Appeals for the Fifth Circuit be vacated, reversed and set aside, and that the judgment of the United States District Court of the Southern District of Mississippi, Southern District, be reinstated.

Respectfully submitted,

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APPENDIX

MISSISSIPPI CODE OF 1942, RECOMPILED

Section 8176

(a) No person shall operate a vehicle on the highways of the State at a speed greater than the following:

1. Truck or truck-trailer combination, forty-five (45) miles per hour. Provided, however, that as to speed limits "pick-up" trucks ½ ton and under, and not overloaded, shall be treated as "private passenger cars" as mentioned in subsection (3) of this section.

2. Passenger bus, fifty-five miles per hour.

3. Private passenger vehicles, sixty (60) miles per hour.

(b) The driver or operator of any motor vehicle must decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when travelling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic, or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements.

(c) Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of highway.

(d) In every charge of violation of this section the complaint, also the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed applicable within the district or at the location.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) All motor vehicles operating on the public highways in this state, carrying passengers for hire, shall be equipped at all times with a speedometer, in good workable condition, reflecting the correct speed, with a dial sufficiently large to be read by the passengers on the said motor vehicle.

Section 8202

(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

(d) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precuation upon observing any child or any confused or incapacitated person upon a roadway.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24604

HENRY WENDELKEN,

Appellant,

versus

JOHN K. McMURRAY, by his Conservator,
MRS. JOHN K. McMURRAY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(December 14, 1967)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

GODBOLD, Circuit Judge: This is an appeal from a substantial judgment for the plaintiff in a non-jury trial, for injuries received in a two-car automobile collision. We reverse because the evidence conclusively shows that the defendant was guilty of no negligence causing or contributing to plaintiff's injuries. Both plaintiff and defendant are victims of the misconduct of a drunken pedestrian.

The defendant, Wendelken, was traveling east on U.S. Highway 90 in an open and uninhabited rural area in southern Mississippi. The highway was straight for several miles east and west, four lanes, two contiguous lanes of blacktop

asphalt on each side of a 40-foot grass median strip. Defendant was driving in his right hand lane. The asphalt surface on each side of the median was 24 feet.

The time was about 2:30 p.m. It had been raining off and on and was still misty, but visibility was good. The highway was wet but traction good.

The median sloped gently to its center from each of the paved strips; it was soft and wet from the rains. There were no obstructions to vision, no intersection, houses or improvements on either side of the highway. The nearest structure was a highway truck stop or restaurant two miles east.

Wendelken was driving at not in excess of 60 miles per hour; in fact all traffic, eastward and westward, was moving at an even flow of about 60. The assigned maximum speed in the area was 65. Several cars were behind defendant, the nearest about 100 feet.

Defendant first observed Oldham, the pedestrian, when he was 500 to 600 feet away. Oldham was standing still on the south shoulder about two feet off the pavement and facing north. He was not looking at eastbound traffic and gave no appearance that he was going to cross the road. Nor to defendant did he appear to be drunk. At that point the stabilized shoulder was approximately eight feet wide, bordered by a downward sloping grass area.

Wendelken did not reduce his speed. When the auto was 200 to 250 feet from the pedestrian, Oldham left his stationary position and took his first step onto the pavement, still facing northward, and continued across. There is no evidence that prior to the movement Oldham began to move onto the pavement he communicated by any physical act or appearance that he was intoxicated. After the accident he was found to be drunk.

When Oldham stepped onto the pavement defendant took evasive action. There is no evidence that he delayed. He applied his brakes. There is evidence that he blew his

horn (the trial court made no finding whether he did or not). He veered to the left. Other cars behind him began to pull to the left also. Oldham continued to walk northward. To avoid striking him Wendelken drove onto the median, entering it at the moment of passing Oldham, who was then north of the center line strip. In the median he slid out of control, thence into the west-bound lanes and collided with plaintiff's automobile traveling in the northmost lane.

The trial judge found that Wendelken's duty to Oldham began when he first saw him on the south shoulder of the highway in an uninhabited and deserted area; he found that the defendant, knowing Oldham was not looking at oncoming traffic, was negligent in failing to immediately slow his car, and if necessary stop, and his failure to do so caused him to lose control.

Whether in this clearly established factual situation, with the material facts not in dispute, the driver is under a duty to the pedestrian to slow or stop his car is a question of law. There is no such duty. Reasonable care does not require it.[1]

Defendant's situation is that presented daily to innumerable drivers traveling the thousands of miles of high-speed four-lane highways that spread across the nation. Many of the four-lanes are routed through uninhabited areas to facilitate uninterrupted movement of vehicles. Traffic does not slow or stop each time a driver traveling

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[1] Counsel have pointed us to no Mississippi case on this point, nor has our research yielded such a case. However, numerous cases from other jurisdictions rely on the common sense principle that a motorist may assume that an adult pedestrian showing no signs of incapacity will not move from a place of safety into the path of a moving automobile. *E.g., Whittaker v. Thornberry*, 306 Ky. 830, 209 S.W. 2d 498 (1948); *Trainor's Adm'r v. Keller*, 257 Ky. 840, 79 S.W.2d 232 (1935); *Silvera v. Gallardo*, 63 So.2d 15 (La. App. 1953); see cases cited at 3 *Blashfield, Automobile Law & Practice* §§ 141.11, -.16 & -.24 (3d ed. 1965).

at a legal speed on a multilane highway observes an adult pedestrian in an uninhabited area standing at the roadside in a place of safety, not observing traffic and showing no signs of abnormal conduct. A requirement to do so would be consistent neither with the purpose of the highway nor with the safety of the traffic moving on it.

If the stationary pedestrian is a child of tender years, or communicates by appearance or action that he is intoxicated, ill or otherwise not in possession of his faculties, the approaching driver may be bound to anticipate that he will—or that there is sufficient risk that he might—leave his place of safety and come onto the traveled highway. *Miss. Code Ann.* § 8202(d) (repl. vol. 1956); *Avery v. Collins,* 71 Miss. 636, 157 So. 695 (1935); 4 *Blashfield, Automobile Law & Practice* §§ 151.12 & -.22 (3d ed. 1965). But that principle has no application in this case, for no one observed signs of Oldham's drunkenness until he began his movement across the pavement, nor is there evidence that prior to that time defendant should have known he was drunk.

Sec. 8176(b) of the Mississippi Code of 1942 provides:

> "The driver or operator of any motor vehicle must decrease speed . . . when special hazard exists with respect to pedestrians or other traffic, or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements."

The evidence of its being a rainy day and of the highway surface being wet are not in this case such "special hazards" as required Wendelken to travel slower than the lawful 60 miles per hour which he and the other drivers in the vicinity were maintaining, for visibility was good and traction was good; the court did not find the 60-mile speed excessive prior to the sighting of Oldham. The defendant decreased his speed as soon as Oldham stepped onto the pavement.

When Oldham left a place of safety and without warning moved onto the pavement defendant was thrust into an emergency not of his making. He was faced with the choice of swinging to the left in front of Oldham and toward the median, or to the right behind Oldham and toward the eight-foot shoulder. The district court made no finding that after the emergency arose Wendelken acted with less than the care and prudence of a reasonable man faced with such a situation, and this court too finds no after-emergency want of care. See *Majure v. Herrington*, 139 So.2d 635 (Miss. 1962); 2 *Blashfield, supra* § 102.29.

The general duties of care of every driver to keep his car under control, to drive at a reasonable speed having due regard to traffic and the use of the highway by others, to keep a lookout for others, and the absence of a right to assume that all others are obeying traffic laws, do not impose liability on this defendant—until Oldham created a situation of emergency and peril defendant was traveling at a reasonable speed, with his car under control, keeping a lookout and had observed Oldham, and Oldham was obeying the traffic laws.

The seriously-injured plaintiff, traveling at a legal speed on his side of the four-lane, is a victim. Wendelken supplied the impact, but he too is a victim without fault.

Because of our conclusion we do not consider the issue made by appellant, that the complaint claimed only negligence of defendant in losing control of his car after an intoxicated pedestrian stepped into his path, while liability was found based on negligent failure to slow or stop on first seeing the pedestrian. Nor do we reach the question whether a breach of duty to the pedestrian would be a breach of duty to those occupying cars traveling in the other two lanes of the divided four-lane highway.

REVERSED with direction to enter judgment for the appellant.

HUGHES, District Judge, Dissenting:

It is my opinion that the evidence is sufficient to sustain the findings of the trial court and I would affirm.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with direction to enter judgment for the appellant, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, John K. McMurray, by his Conservator, Mrs. John K. McMurray, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 14, 1967

Court Costs: Docketing cause, etc. – $25.00

HUGHES, District Judge, dissents.

Issued as Mandate: [illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19....

No. 1375

JOHN K. McMURRAY,
by his conservator,
Mrs. John K. McMurray,

Petitioner

v.

HENRY WENDELKEN,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY JOHN K. McMURRAY

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN K. McMURRAY
by his conservator,
Mrs. John K. McMurray, PETITIONER,

Vs. No. 1375

HENRY WENDELKEN, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY JOHN K. McMURRAY

STATEMENT OF FACTS

The statement of facts recited by the Petitioner, John K. McMurray, in his Petition for a Writ of Certiorari does not fully present the facts pertinent to the issues here involved. Important considerations, such as the fact that Wendelken was the first of several cars in a line of traffic, were omitted. The record showed that following the Wendelken car, at not exceeding one hundred feet (R. 606), was a second car; and to the rear of this second car were three or four other cars (R. 130). In order to fairly and accurately present the pertinent facts in this case, and since the Opinion of the Court below contains a concise statement of these facts, no part of which Statement is challenged, we quote from the Opinion:

"The defendant, Wendelken, was traveling east on U.S. Highway 90 in an open and uninhabited rural area in southern Mississippi. The highway was straight for several miles east and west, four lanes, two contiguous lanes and blacktop asphalt on each side of a 40-foot grass median strip. Defendant was driving in his right hand lane. The asphalt surface on each side of the median was 24 feet.

"The time was about 2:30 p.m. It had been raining off and on and was still misty, but visibility was good. The highway was wet but traction good.

"The median sloped gently to its center from each of the paved strips; it was soft and wet from the rains. There were no obstructions to vision, no intersection, houses or improvements on either side of the highway. The nearest structure was a highway truck stop or restaurant two miles east.

"Wendelken was driving at not in excess of 60 miles per hour; in fact all traffic, eastward and westward, was moving at an even flow of about 60. The assigned maximum speed in the area was 65. Several cars were behind defendant, the nearest about 100 feet.

"Defendant first observed Oldham, the pedestrian, when he was 500 to 600 feet away. Oldham was standing still on the south shoulder about two feet off the pavement and facing north. He was not looking at eastbound traffic and gave no appearance that he was going to cross the road. Nor to defendant did he appear to be drunk. At that point the stabilized shoulder was approximately eight feet wide, bordered by a downward sloping grass area.

"Wendelken did not reduce his speed. When the auto was 200 to 250 feet from the pedestrian, Oldham left his stationary position and took his first step onto the pavement, still facing northward, and continued across. There is no evidence that prior to the moment Oldham began to move onto the pavement he communicated by any physical act or appearance that he was intoxicated. After the accident he was found to be drunk.

"When Oldham stepped onto the pavement defendant took evasive action. There is no evidence that he delayed. He applied his brakes. There is evidence that he blew his horn (the trial court made no finding whether he did or not). He veered to the left. Other cars behind him began to pull to the left

also. Oldham continued to walk northward. To avoid striking him Wendelken drove onto the median, entering it at the moment of passing Oldham, who was then north of the center line strip. In the median he slid out of control, thence into the westbound lanes and collided with plaintiff's automobile traveling in the northmost lane." (338 Fed 2d, 554-5)

ARGUMENT

I

The Court did not fail to apply the Mississippi law applicable to the facts.

Essentially, the Petitioner rests his right to the writ on his claim that the Court below failed to take into consideration the substantive law of the State of Mississippi in arriving at its decision. Nothing could be farther from the truth. A careful reading of the Court's Opinion shows that the Mississippi statutes and the Mississippi cases invoked by the Petitioner were carefully examined.

Section 8176 of the Mississippi Code of 1942 Recompiled, and particularly Paragraph (b) thereof, says that a driver of a motor vehicle must decrease his speed when a special hazard exists with respect to pedestrians or other traffic.

Paragraph (a) of Section 8202 of the same code provides that every pedestrian crossing a roadway at any point other than a marked crossway shall yield the right of way to all vehicles on the roadway. Paragraph (d) of the same section says that notwithstanding the other provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon the roadway.

It will be noted that the above sections have to do with pedestrians' right to use the roadway, and particularly do these sections refer to pedestrians upon the roadway and not off the roadway

The Petitioner places great emphasis on Avery v. Collins, 71 Miss. 636, 157 So. 695, decided in the year 1934. This case has little resemblance, if any, to the case in hand. In Avery v. Collins the operator of the automobile was driving westwardly on a public highway in an unincorporated settlement called Cranfield, Mississippi. At this point the highway crosses a railroad and then proceeds westerly alongside the railroad upon level and open ground. After the appellant, or driver of the vehicle, had crossed the railroad and had reached a point about 50 feet beyond and west of the crossing, he saw the deceased, a boy

thirteen years of age, about 150 to 175 feet further west, walking in the road and about four feet from his right hand side thereof. This gravel road was only 18 feet wide. The deceased was walking westwardly with his back to the approaching automobile. In the instant case, the pedestrian, when first noticed, was standing entirely off of the paved portion of a four-lane arterial highway. The pedestrian was a mature man, having an unobstructed view of all approaching traffic. Moreover, in the Avery v. Collins case, the Court was careful to say that no case of sudden emergency was presented by the facts.

In the case of McMinn v. Lilly, 60 So. 2d 603, a child was riding a bicycle and suddenly turned into the side of a truck. The child was using the highway, as he had a right to do. This case further points out that although a motorist is required to use due care when seeing a child upon the highway, recognizing that a young person will not always act to protect himself from danger as will a mature adult, still the rule does not impose liability if the motorist uses all reasonable precaution to avoid an accident and the sudden act of the child creates an emergency, rendering it impossible for the motorist to avoid hitting the child. Likewise, Stevenson v. Robinson, cited in 37 So.2d 568, has to do with children walking along the highway, using it for a walkway; and in substance, the same rule is advanced.

In the case of Layton v. Cook, 160 So.2d 685, cited by the Petitioner, we

have a complete departure from all relevance to the case at hand. In that case, the Court was concerned with a motorist who saw an oncoming automobile approaching with extremely bright and blinding lights while he was driving in excess of the speed limit, and in which case the motorist did not slow down or see the boys walking along the shoulder of the roadway.

II

The Court below gave full force and effect to all applicable Mississippi law.

The Court below concluded, and correctly so, that both the Petitioner and the Respondent were victims of the actions of the drunk pedestrian, Oldham. The evidence conclusively showed that Wendelken was guilty of no negligence causing or contributing to McMurray's injuries. When Oldham, the pedestrian, walked from a place of safety into the paved portion of the highway, he created an emergency not of Wendelken's making. When this event happened, Wendelken immediately decreased his speed and veered to the left, blowing his horn (R. 282-283-284-285). To have taken a different course of action would have been disastrous to the occupants of the cars to the rear of him. Thus we see that Wendelken acted as any reasonable and prudent person would have done under similar circumstances when faced by sudden emergency.

At no time prior to the accident did Wendelken know that Oldham was intoxicated (R. 645).

The Mississippi law applying to this case was followed implicitly. The case is comparable to Majure v. Herrington found in 139 So. 2d 635. This is a Mississippi case, decided in the year 1965. In this case, Mrs. Irby Majure filed a suit in Circuit Court of Lauderdale County against Mrs. Sally E. Herrington and her husband, Dr. James E. Herrington, seeking to recover damages for personal injuries. The jury returned a verdict in favor of the defendants. The accident occurred about 3 o'clock P.M., August 7, 1960, and the plaintiff charged in her declaration that the appellees were guilty of negligence in the operation of their automobile by Sally E. Herrington in that she "lost control of the automobile and ran across the center line of the highway and caused her automobile to collide with the automobile in which the appellant was riding at the time the automobile in which she was riding was on its proper side of the highway." At the time of the accident, the plaintiff, Mrs. Majure, had visited her daughter in Slidell, Louisiana, and was in route from Slidell to Union, Mississippi, traveling north on U.S. Highway 11. Mrs. Herrington was proceeding south, and on reaching the crest of a hill saw three automobiles approaching in the northbound lane, heading north, and a fourth car, a blue Ford

automobile, approaching at a rapid rate of speed in a northerly direction and in Mrs. Herrington's own lane of travel. This blue Ford was only a few car lengths ahead of her, and she saw no way to avoid a head-on collission except by turning to her right and onto the west shoulder of the highway. This she did, and she stated that the roughness of the shoulder of the highway and the wheels of her car striking some obstacles on the shoulder of the highway caused her to lose control of the movements of her car. She applied her brakes to the extent she thought safe, but was afraid to lock the brakes for the reason that to do so might have upset the automobile. She was unable to bring her car under control before she collided with the Majure automobile, which was still traveling north but in the east traffic lane of the highway. The plaintiff had requested a peremptory instruction which the lower court had refused, and the Supreme Court of Mississippi said that there was no error in the lower court's refusal to grant such an instruction; "The appellees' defense throughout the trial was that the plaintiff's injury was proximately caused, not by the negligence of the defendants, but by an interviewing independent and efficient cause, to-wit: The negligent and reckless act of the unknown driver of the blue Ford automobile in turning into the southbound traffic lane of the highway only a few feet below the crest of the hill and forcing the defendants' automobile off of the highway and onto the

rough shoulder, thereby causing the operator of the defendants' car to lose control of its movements."

The Court further said: "The rule is well settled that, 'Where the operator of a motor vehicle is by a sudden emergency, not caused in whole or in part by him, placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same coolness, accuracy of judgment, or degree of care as is required of him under ordinary circumstances, or of one having ample opportunity for the full exercise of judgment, and is not liable for injuries caused by his vehicle if an accident occurs, provided he exercises ordinary or reasonable care or prudence, considering the stress of the circumstances, to avoid an accident, * * *.'" 60 C.J.S. Motor Vehicles §257a, p. 624, 625. See also Vann v. Tankersly, 164 Miss. 748, 145 So. 642; Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 108 So. 2d 409; Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333; Fink v. East Miss. Electric Power Ass'n, 234 Miss. 221, 105 So. 2d 548.

In discussing the degree of care required of a motorist confronted by a sudden emergency not caused by him, this Court, in Moore v. Taggart, 233 Miss. 389, 102 So.2d 333, quoted with approval the statement in 1 Blashfield,

Cyclopedia of Automobile Law and Practice, Vol. 1, Part 2, Perm. Ed., Sec. 668, pp. 538-545, which is as follows:

> "When one is confronted with a sudden peril requiring instinctive action, he is not, in determining his course of action, held to the exercise of the same degree of care as when he has time for reflection, and, in the event that an automobilist suddenly meets with an emergency which naturally would overpower the judgment of a reasonably prudent and careful driver, so that momentarily he is thereby rendered incapable of deliberate and intelligent action, and as a result injures a third person, he is not negligent, provided he has used due care to avoid meeting such an emergency and, after it arises, he exercises such care as a reasonably prudent and capable driver would use under the unusual circumstances, which is usually for the jury."

In Carey-Reed Co. v. Carney, a Mississippi case decided by the Fifth Circuit Court of Appeals and found in 117 Federal 2d at page 108, the Court held that the reasonable care which a motorist must exercise to avoid injury is the care which a reasonably prudent man would use under the same or similar circumstances. In the Carey-Reed case an employee of this company, one J. D. Shaver, Jr., was driving an automobile

along a highway south of Clarksdale, Mississippi, at a reasonable rate of speed, when he saw a man walking along the road. The man began to walk diagonally across the road into the path of the Shaver car and motioned for Shaver to stop. Shaver sounded his horn and reduced his speed, and as he came nearer to the man, the pedestrian kept walking, forcing Shaver into the ditch on the right side of the road. The appellee contended the pedestrian was drunk. The Court said, "There is nothing in the record to show that Shaver knew or ought to have known that Jackson was drunk or incapacitated. His alleged intoxication can therefore have no bearing upon this case." Shaver was driving at a moderate rate of speed when he first saw Jackson; he sounded his horn and reduced his speed; he tried to go around Jackson, and, in attempting to do so, he ran his car off the road, striking the stranger as the car ran into the ditch. Under these circumstances, the Court held that defendant's employee was "in no wise negligent."

CONCLUSION

It is respectfully submitted that the Petition herein does not present a case of which the Court should take jurisdiction on writ of certiorari under Rule 19 of the Court's rules. The decision of the Court of Appeals below is not in conflict with any decision of another court of appeals on the same

matter, nor does it conflict with any applicable state or territorial law; nor does it decide any important question of Federal law which has not been but should be settled by the Supreme Court; nor has the Court below decided the Federal question in a way which conflicts with applicable decisions of this Court.

Quite to the contrary, this case involves an automobile accident wherein both the original plaintiff and the original defendant were victimized by a pedestrian who after the accident appeared to be drunk. The real culprit was the pedestrian, and it would be a gross miscarriage of justice to assess damages against anyone other than the party at fault.

Respectfully submitted,

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CERTIFICATE

I certify that I have this day served a copy of the foregoing brief upon John Joseph Leahy, 532 Munsey Building, Washington, D.C. 20004, by First Class United States Air Mail, postage prepaid, and upon Mark Clarke Fedota and Louis Fondren by First Class United States Mail addressed to their post office address, Post Office Box 506, Pascagoula, Mississippi, 39567.

This, the _____ day of _____, A.D. 1968.

_____

David Cottrell, Jr.
Of Counsel for Henry Wendelken, Respondent